Supreme Court, U. S.
FILED
MAR 28 1927
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 162

SAMUEL J. KORNHAUSER, Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

L. L. HAMBY,
Attorney for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 829.

SAMUEL J. KORNHAUSER, PETITIONER,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF.

Respondent has interposed several objections to the granting of the writ herein sought. To these objections only the briefest reply seems necessary.

I.

Respondent states on page four of its brief that no question of importance to taxpayers in general is in-

volved in this case, although it may be important to petitioner. Every citizen of the United States who is engaged in business is liable to be sued. Can it be doubted, then, that it is a matter of greatest importance to them whether attorneys' fees paid in defending a suit arising in connection with their business may be deducted from their gross income in computing the Federal income tax? The question, therefore, is not alone important to the petitioner but to everyone similarly involved.

Respondent states that claim for a deduction of this kind is an exception rather than a rule. It may be said that the loss of property by one, as the result of storm or fire, is an exception rather than a rule; but the same revenue act allows deduction for such loss. Is it to be denied because exceptional? The test does not seem to be whether it is exceptional, but whether the provisions of the law contemplate the deduction.

II.

On page four of its brief respondent states that attorneys' fees paid out in defense of the suit in this case did not affect petitioner's business as the partnership had already been dissolved and regardless of the decision in the suit, the income of the partnership was neither enhanced nor diminished. This case does not relate to any tax on a partnership, for the revenue act in question imposed no taxes upon partnerships, but only upon the individual members; furthermore, the suit was brought against this petitioner and the

attorney's fee was paid by him after the partnership had been dissolved, as respondent admits.

III.

Respondent next argues, at the bottom of page four and the top of page five of its brief, that the expense or loss was not incurred or sustained within the meaning of the words "in trade or business" as used in the Revenue Act of 1918, and for a definition of those words the case of Mente *v.* Eisner, 266 Fed. 161, is cited. The merest glance at this case shows that it arose not under the Revenue Act of 1918, which controls this case, but under Section II, subdivision 2B of the Act of October 3, 1913 (38 Stat. 167), which provided that in computing net income there shall be allowed as a deduction:

> "4th, losses actually sustained during the year incurred in *trade* or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise." (Italic letters supplied.)

Mente was a member of the firm of Mente & Company, engaged in the *manufacturing* business, and as the court said in that case:

> "He had for some three years been buying and selling cotton on the Cotton Exchange for his individual account, in no way connected with the business of Mente & Co., and he deducted from his gross income in each year losses sustained in the year resulting from these transactions as 'losses incurred in trade.'"

The court on page 162 of its opinion took the view that the language "losses incurred in trade" were intended to mean losses in the actual business of the taxpayer which in that case was manufacturing and that his speculation in cotton futures on the side constituted an isolated transaction not connected with his trade. A strong dissenting opinion was filed.

Singularly, the 1918 Act permits deduction of the very thing which the court in the case cited disallowed under the earlier 1913 Act. Furthermore, the 1918 Act does not confine the deduction to losses or expenses sustained or incurred merely in trade but "in carrying on *any trade* or *business*." Your petitioner was engaged in the practice of law and surely it can not be contended that a lawyer is not engaged in business within the meaning of paragraphs (1), (2) and (3), Sec. 214(*a*) of the 1918 Act.

It will be seen, therefore, that the case cited is not analogous; that the statute involved therein is quite a different one; and finally that under the facts in the case cited the deduction would be allowed as a deduction under paragraph (5) of Sec. 214 of the 1918 Act, as the Treasury Department has uniformly held since the passage of that act.

IV.

Your petitioner has directed attention to the fact that this Court at the present term has granted a petition for a similar writ in a case which involves one of the two questions arising in this case relating to the meaning of the word "loss" as used in the Revenue

Act of 1918. We find no allusion to this in respondent's brief and therefore assume it to be admitted.

We think no valid objection to the granting of the writ has been interposed by the respondent and believe it should issue.

Respectfully submitted,

L. L. HAMBY,
Attorney for the Petitioner.